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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BOB BEJARANO,

Defendant and Appellant.

B206565

(Los Angeles County
Super. Ct. No. PA046430)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ronald S. Coen, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

A jury found appellant, Bob Bejarano, guilty of second degree murder (Pen. Code, § 187, subd. (a)),¹ during which he personally and intentionally discharged a firearm causing death (§ 12022.53, subds. (b), (c), & (d)) (count one) and discharging a firearm at an occupied motor vehicle (§ 246)), during which he personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)) (count two). As to both offenses, the jury determined they had been committed for the benefit of, at the direction of and in association with a criminal street gang (§ 186.22, subd. (b)(1)(A)). The trial court sentenced Bejarano to 40 years to life in prison.

On appeal, this court determined the merger doctrine articulated in *People v. Ireland* (1969) 70 Cal.2d 522 and its progeny precluded conviction of second degree felony murder based on the felony of discharging a firearm at an occupied motor vehicle. (*People v. Bejarano* (2007) 149 Cal.App.4th 975.)² Relying on *Ireland*, the court indicated that the felony of discharging a firearm merged with the resulting homicide. Since the jury had been instructed on both second degree felony murder and the discharging of a firearm at a motor vehicle, we reversed the judgment with regard to the finding Bejarano had committed second degree murder and remanded the matter for a new trial on that count. This appeal is from the judgment entered following remand.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.³

On the evening of August 28, 2003, Merced Ramirez was driving his Honda near the intersection of Roxford Drive and San Fernando Road in Los Angeles. A bullet

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² In response to Bejarano's request, we take judicial notice of the opinion in *People v. Bejarano, supra*, 149 Cal.App. 4th 975, as well as the briefs filed, the reporter's transcript, the clerk's transcript and other court records in that matter. (Evid. Code, § 459.)

³ The facts have been summarized from this court's opinion in *People v. Bejarano, supra*, 149 Cal.App.4th 975.

shattered the Honda's rear window and entered the back of Ramirez's head, killing him. The Honda stopped when it crashed approximately 500 feet from Bejarano's driveway.

In February 2004, Bejarano told Los Angeles Police detectives several different stories regarding the crash of Ramirez's Honda. He initially told the detectives that he had been asleep or in the shower at the time of the crash. However, he ultimately told the police that he and several other individuals were outside his house when a black Oldsmobile pulled up. The Oldsmobile's two occupants were yelling their gang name. Although he did not see a gun, Bejarano became angry. He believed one of the occupants of the Oldsmobile was going to shoot him, so he " 'put . . . the gun at him.' (*Sic.*)" (*People v. Bejarano, supra*, 149 Cal.App.4th at p. 980.) Bejarano, who was standing on the sidewalk in front of his house, pointed the gun at the Oldsmobile as it drove away. The gun then "went off once." (*Ibid.*) By the time the gun fired, the Oldsmobile was " 'far' " from Bejarano; it was probably on San Fernando Road at Roxford Drive. (*Ibid.*) Although he was shooting at the " 'gangsters,' " Bejarano did not see the bullet hit the Oldsmobile. (*Ibid.*) Bejarano had never intended to shoot Ramirez.

2. Procedural History.

On remand, Bejarano filed a motion pursuant to Code of Civil Procedure section 170.6, indicating he wished to have the matter tried before a different judge. The case was, accordingly, transferred to a different courtroom. However, when the case was transferred, the trial court instructed the parties that, should the People be unable to proceed as to the felony murder count, the matter was to go back to the original courtroom for sentencing. The trial court explained that the Code of Civil Procedure section 170.6 motion had been untimely with regard to the count alleging the discharge of a firearm at an occupied motor vehicle and any remaining allegations.

At proceedings held on January 30, 2008, the People indicated they would be unable to proceed as to the felony murder count. The deputy district attorney stated: "[A]nd so if the court grants the defense's motion to dismiss, pursuant to [section]

1382⁴] . . . , we would request that the case be sent to Department ‘E’ on February 13 of this year for resentencing as to the remaining counts and allegations.” The trial court then dismissed the count alleging second degree murder and ordered the matter transferred to Department “ ‘E’ ” for “resentencing on the remaining counts.”

At proceedings held on February 13, 2008, defense counsel, at the request of Bejarano, asked for a new sentencing report and that sentencing be set for March 11, 2008. When the trial court asked Bejarano if that was agreeable with him, the following colloquy occurred: “The court: Is that agreeable with you, Mr. Bejarano? [¶] [Bejarano]: No, I don’t agree. [¶] The court: Why? [¶] [Bejarano]: I don’t understand why I’m getting resentenced. [¶] The court: Because that’s what the Court of Appeal ordered. [¶] [Bejarano]: Well, I came for a retrial. [¶] The court: They are not going on count 1. That leaves count 2. Count 2 is affirmed, sir. [¶] [Bejarano]: Can I get a retrial on count 2? [¶] The court: No. [¶] You doing this in the best interest of your client? [¶] [Defense counsel]: He is the one who requested it, Your Honor. I wanted to do the sentencing today. He asked for more time. I said I’d request for more time. [(*Sic.*)] [¶] The court: You want to put the sentencing over to March 11th or no? [¶] (Defendant and counsel confer.) [¶] The court: You want to explain. [¶] [Defense counsel]: I have, Your Honor. I explained it to him in there. He is asking, so. [¶] The court: The Court of Appeal reversed count 1. Do you understand that? [¶] [Bejarano]: Yes. [¶] The court: They affirmed count 2. Do you understand that? [¶] [Bejarano]: Yes. [¶] The court: There is no trial as to count 2. [¶] [Bejarano]: Yes. [¶] The court: The sentence I imposed on count 2 was stayed. I have to do a new sentencing on count 2. Do you understand that? [¶] [Bejarano]: Yes. [¶] The court: Your attorney said you

⁴ Section 1382 provides in relevant part: “(a) The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases: [¶] . . . [¶] (2) In a felony case, when a defendant is not brought to trial within 60 days of the defendant’s arraignment on an indictment or information, or reinstatement of criminal proceedings”

wanted a new report. You wanted to put the matter over. Do you or do you not? [¶]
[Bejarano]: Yes.” The matter was then continued to March 11, 2008 for sentencing.

At proceedings held on March 11, 2008, Bejarano indicated that he wished to proceed in propria persona. After warning Bejarano of the pitfalls of self-representation, the trial court found Bejarano’s decision had been “knowingly, understandingly, and intelligently made” and granted his motion for self-representation. The trial court then denied Bejarano’s motion for a new trial as to count 2 as untimely.

After indicating it had read Bejarano’s memorandum, the trial court sentenced Bejarano to life in prison “with a minimum period of 15 years” for discharging a firearm at an occupied motor vehicle (§§ 246; 186.22, subd. (b)(1)(A) & (4)). For his personal use of a firearm during the offense, the trial court imposed a term of 25 years to life (§ 12022.53, subd. (d)). The trial court struck the gang enhancement “as [it] was used to enhance the minimum period for parole institute [(sic)] count 2.” In total, the trial court sentenced Bejarano to 40 years to life in prison.

Pursuant to section 1202.4, subdivision (f), the trial court ordered restitution to Gabriella Ramirez, the spouse of the decedent Ramirez, in the amount of \$3,039.95. Pursuant to subdivision (f)(2) of the same section, the trial court ordered restitution to the “victim compensation board” in the amount of \$7,293.80. The trial court then imposed a \$10,000 restitution fine (§ 1202.4, subd. (b)), a \$10,000 suspended parole revocation restitution fine (§ 1202.45) and a \$20 court security fee (§ 1465.8, subd. (a)(1)). The trial court awarded Bejarano presentence custody credit for 1,496 days actually served and 52 days of conduct credit. The Department of Corrections and Rehabilitation was directed to determine the remainder of Bejarano’s credit for good time/work time.

Bejarano filed a timely notice of appeal on March 11, 2008. This court appointed counsel to represent Bejarano on appeal on July 1, 2008.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed October 29, 2008, the clerk of this court advised Bejarano to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider.

After receiving an extension of time within which to file it, Bejarano filed a supplemental brief on January 20, 2009. Bejarano filed a second brief, which he characterizes as a “Motion for Modification,” on January 22, 2009.

Bejarano first contends the trial court erred in denying his motion for a new trial, which he made pursuant to section 1118.1⁵ before pronouncement of judgment in the trial court. However, whether the trial court erred in denying Bejarano’s motion is not cognizable on this appeal. The present appeal encompasses only those issues arising from the proceedings following remand by this court to the trial court for a new trial on the count alleging second degree murder.

The same is true for Bejarano’s second contention, that there is insufficient evidence to support his conviction of discharging a firearm at an occupied motor vehicle as alleged in count two. The jury found the allegation true and, on appeal, this court found sufficient evidence supported the charge. Bejarano cannot now contend in this appeal that the evidence failed to support the jury’s finding.

Bejarano’s third contention, that at his initial trial, the court improperly allowed evidence of shotguns and a Colt revolver, also cannot be considered. Whether such evidence was prejudicial is a question which should have been considered on Bejarano’s initial appeal from the judgment of conviction.

⁵

Section 1118.1 provides in relevant part: “In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.”

We may, however address Bejarano's fourth contention. He asserts the trial court erred when it imposed a \$10,000 restitution fine without considering his ability to pay such a fine.

Subdivision (a)(3) of Section 1202.4 provides in relevant part: "The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay both of the following: [¶] (A) A restitution fine in accordance with subdivision (b). [¶] (B) Restitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment."

Subdivision (b) of section 1202.4 provides: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony"

"Restitution hearings held pursuant to section 1202.4 are sentencing hearings and are thus hearings which are a significant part of a criminal prosecution. [Citation.] Restitution orders have as their goal economic compensation for the victim or victims of a defendant's crime, rehabilitation of the defendant, and the deterrence of the defendant and others from committing future offenses. [Citation.]" (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1386.) Moreover, the amount of the restitution fine, "which is 'at the discretion of the court and commensurate with the seriousness of the offense,' requires no statement of formal reasons on the record. [Citations.] The court need not make express findings 'as to the factors bearing on the amount of the fine' and need not hold a 'separate hearing for the fine.' [Citation.] Unless there are 'compelling and extraordinary reasons,' 'the defendant's 'lack of assets' and 'limited employment potential' are 'not germane' to his or her ability to pay the fine. [Citations.] In the absence of a contrary showing, the court is entitled to presume the defendant will pay the

restitution fine out of future earnings. [Citations.]” (*People v. Urbano* (2005) 128 Cal.App.4th 396, 405.)

Here, the trial court imposed the maximum fine available under the statute. Although the court did not state its reasons, it can be reasonably inferred it imposed the fine due to the irreparable consequences of the crime: an innocent person lost his life as a result of Bejarano’s conduct. Under these circumstances, imposition of the \$10,000 restitution fine was proper.⁶

As his fifth contention, Bejarano asserts the trial court erred by failing to instruct the jury on the lesser included offense of discharging a firearm in a grossly negligent manner. However, as with contentions one, two and three, this contention cannot be considered on this appeal. Had Bejarano wished to contest the instructions given, he must have done so on his initial appeal from the judgment of the trial court.

REVIEW ON APPEAL

We have examined the entire record and are satisfied Bejarano’s counsel has complied fully with counsel’s responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

⁶

In his “Motion for Modification” filed January 22, 2009, Bejarano again argues that imposition of the restitution fine was improper. As concluded above, the contention has no merit.

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.